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7 UNITED STATES DISTRICT COURT  
8 DISTRICT OF NEVADA  
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10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 QUINCY STEPHENS,

14 Defendant.  
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Case No. 2:13-cr-00351-LDG (VCF)

**ORDER**

16 Presently before the court is defendant Quincy Stephens' motion to vacate, set  
17 aside, or correct sentence pursuant to 28 U.S.C. § 2255. (ECF Nos. 46, 47). The  
18 government filed a response (ECF No. 49), to which Stephens replied (ECF No. 51).

19 I. Background

20 Stephens pled guilty to five counts of interference with commerce by robbery  
21 ("Hobbs Act robbery") under 18 U.S.C. § 1951, as charged in Counts 1, 3, 5, 7, and 9 of  
22 the indictment. He also pled guilty to a single count of carrying and use of a firearm during  
23 and in relation to a crime of violence under 18 U.S.C. § 924(c), specifically the interference  
24 with commerce by robbery charged in Count 9 of the indictment. This Court sentenced  
25 Stephens to 67 months of imprisonment as to each of the Hobbs Act robbery convictions,  
26 to be served concurrently. The Court also found that, as to Stephens' conviction in Count

1 10 for violating §924(c) by carrying and use of a firearm during and in relation to a crime of  
2 violence, his conviction on Count 9 for the Hobbs Act robbery qualified as a “crime of  
3 violence.” Accordingly, the Court imposed an 84-month term of imprisonment as to the  
4 §924(c) conviction to be served consecutive to the sentence for the Hobbs Act robbery  
5 convictions, resulting in a total term of imprisonment of 151 months.

6 In the instant motion, Stephens moves to vacate his §924(c) conviction and  
7 sentence pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015), and requests that  
8 the court resentence him to 67 months imprisonment as to his conviction on the five counts  
9 of Hobbs Act robbery.

## 10 II. Analysis

11 A federal prisoner may move to “vacate, set aside or correct” his sentence if it “was  
12 imposed in violation of the Constitution.” 28 U.S.C. § 2255(a). When a petitioner seeks  
13 relief pursuant to a right recognized by a United States Supreme Court decision, a  
14 one-year statute of limitations for seeking habeas relief runs from “the date on which the  
15 right asserted was initially recognized by the Supreme Court.” 28 U.S.C. § 2255(f)(3). The  
16 petitioner bears the burden of demonstrating that his petition is timely and that he is entitled  
17 to relief.

18 In *Johnson*, the United States Supreme Court held that the residual clause in the  
19 definition of a “violent felony” in the Armed Career Criminal Act of 1984, 18 U.S.C. §  
20 924(e)(2)(B) (“ACCA”), is unconstitutionally vague. 135 S. Ct. at 2557. The ACCA defines  
21 “violent felony” as any crime punishable by imprisonment for a term exceeding one year,  
22 that:

23 (i) has as an element the use, attempted use, or threatened use of physical  
24 force against the person of another; or

25 (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise  
26 involves conduct that presents a serious potential risk of physical injury to  
another.

1 18 U.S.C. § 924(e)(2)(B). Subsection (ii) above is known as the ACCA's "residual clause."  
2 *Johnson*, 135 S. Ct. at 2555–56. The Supreme Court held that "increasing a defendant's  
3 sentence under the clause denies due process of law." *Id.* at 2557.

4 Stephens was not, however, sentenced pursuant to ACCA. Rather, he was  
5 convicted of violating 18 U.S.C. §924(c) for carrying and use of a firearm during and in  
6 relation to a crime of violence. Section 924(c)(3) provides:

7 the term "crime of violence" means an offense that is a felony and—

8 (A) has as an element the use, attempted use, or threatened  
9 use of physical force against the person or property of another,  
or

10 (B) that by its nature, involves a substantial risk that physical  
11 force against the person or property of another may be used in  
the course of committing the offense.

12 As with the ACCA, subsection (a) is referred to as the force clause while subsection (B) is  
13 referenced as the residual clause. Stephens argues that *Johnson* is equally applicable to  
14 §924(c) cases and that his instant motion is timely as it was filed within one year of  
15 *Johnson*. The Ninth Circuit, however, subsequently held to the contrary. When Stephens  
16 filed his present motion, "[t]he Supreme Court [had] not recognized that § 924(c)'s residual  
17 clause is void for vagueness in violation of the Fifth Amendment." *United States v.*  
18 *Blackstone*, 903 F.3d 1020, 1028 (9<sup>th</sup> Cir. 2018). As indicated by the Ninth Circuit, "[t]he  
19 Supreme Court may hold in the future that *Johnson* extends to sentences imposed . . .  
20 pursuant to 18 U.S.C. § 924(c), but until then [defendant's] motion is untimely." *Id.*  
21 Accordingly, Stephens' motion was premature when it was filed.

22 The Supreme Court has, however, subsequently applied the principles first outlined  
23 in *Johnson* to the residual clause of §924(c), holding "that § 924(c)(3)(B) is  
24 unconstitutionally vague." *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019).  
25 Accordingly, while Stephens' motion was premature when it was filed, the Court will now  
26 consider the motion as timely given the Supreme Court's decision in *Davis*, extending the

1 principles of *Johnson* to §924(c), and will treat the motion as if filed seeking relief pursuant  
2 to *Davis*.

3 Stephens asserts that his conviction is not subject to the provisions of § 924(c)(3)  
4 because his underlying conviction (Hobbs Act robbery) does not constitute a “crime of  
5 violence.” He argues that his §924(c) conviction and sentence is unconstitutional under  
6 *Davis* because a Hobbs Act robbery cannot constitute a crime of violence without relying  
7 on the residual clause. The court disagrees.

8 Stephens argues that a Hobbs Act robbery cannot categorically fall under the force  
9 clause of § 924(c)(3)(A) “[b]ecause a “Hobbs Act robbery . . . can be committed by any  
10 amount of force necessary to accomplish the taking, it does not necessarily require the use  
11 of violent force.” Prior to the Supreme Court's holding in *Davis*, the Ninth Circuit held that  
12 Hobbs Act “[r]obbery indisputably qualifies as a crime of violence” under § 924(c). *United*  
13 *States v. Mendez*, 992 F.2d 1488, 1491 (9th Cir. 1993). In 2016, the Ninth Circuit was  
14 confronted with essentially the same argument that Stephens raises here, that “because  
15 Hobbs Act robbery may also be accomplished by putting someone in ‘fear of injury,’ 18  
16 U.S.C. § 1951(b), it does not necessarily involve ‘the use, attempted use, or threatened  
17 use of physical force,’ 18 U.S.C. § 924(c)(3)(A).” *United States v. Howard*, 650 Fed App'x.  
18 466, 468 (9th Cir. 2016). The Ninth Circuit held that Hobbs Act robbery nonetheless  
19 qualified as a crime of violence under the force clause:

20 [Petitioner's] arguments are unpersuasive and are foreclosed by *United*  
21 *States v. Selfa*, 918 F.2d 749 (9th Cir. 1990). In *Selfa*, we held that the  
22 analogous federal bank robbery statute, which may be violated by “force and  
23 violence, or by *intimidation*,” 18 U.S.C. § 2113(a) (emphasis added), qualifies  
24 as a crime of violence under U.S.S.G. § 4B1.2, which uses the nearly  
25 identical definition of “crime of violence” as § 924(c). *Selfa*, 918 F.2d at 751.  
26 We explained that “intimidation” means willfully “to take, or attempt to take, in  
such a way that would put an ordinary, reasonable person *in fear of bodily*  
*harm*,” which satisfies the requirement of a “threatened use of physical force”  
under § 4B1.2. *Id.* (emphasis added) (quoting *United States v. Hopkins*, 703  
F.2d 1102, 1103 (9th Cir. 1983)). Because bank robbery by  
“intimidation”—which is defined as instilling fear of injury—qualifies as a crime

1 of violence, Hobbs Act robbery by means of “fear of injury” also qualifies as  
2 [a] crime of violence.

Id.

3 The Court holds that a Hobbs Act robbery constitutes a crime of violence under §  
4 924(c)(3)'s force clause. Under the elements set forth in the language of § 1951,  
5 Stephens' underlying felony offense (Hobbs Act robbery) is a “crime of violence” because  
6 the offense has, “as an element the use, attempted use, or threatened use of physical  
7 force against the person or property of another.” 18 U.S.C. § 924(c)(3)(A). Therefore,  
8 *Davis* is inapplicable here because Stephens' conviction and sentence do not rest on the  
9 residual clause of § 924(c). Accordingly, Stephens' motion, which rests upon the premise  
10 that his conviction rests upon the residual clause of §924(c), is without merit.

11 Certificate of Appealability

12 To appeal this order, Stephens must receive a certificate of appealability. 28 U.S.C.  
13 § 2253(c)(1)(B); Fed. R. App. P. 22(b)(1); 9th Cir. R. 22–1(a). To obtain that certificate, he  
14 “must make a substantial showing of the denial of a constitutional right, a demonstration  
15 that . . . includes showing that reasonable jurists could debate whether (or, for that matter,  
16 agree that) the petition should have been resolved in a different manner or that the issues  
17 presented were adequate to deserve encouragement to proceed further.” *Slack v.*  
18 *McDaniel*, 529 U.S. 473, 483–84 (2000) (quotation omitted). This standard is “lenient.”  
19 *Hayward v. Marshall*, 603 F.3d 546, 553 (9th Cir. 2010) (en banc).

20 The Court will deny the certificate of appealability for the same reasons that it has  
21 denied Stephens' claims. Reasonable jurists would not find the Court's determination that  
22 the Ninth Circuit has held that a Hobbs Act robbery is a crime of violence pursuant to the  
23 force clause of §924(c) is debatable, wrong, or deserving of encouragement to proceed  
24 further. Accordingly, the court will decline to issue a certificate of appealability.

25 Therefore, for good cause shown,  
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1 THE COURT **ORDERS** that the United States' Motion for Leave to Advise the Court  
2 of Relevant New Authority (ECF No. 53) is GRANTED;

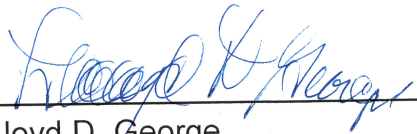
3 THE COURT FURTHER **ORDERS** that Quincy Stephens' Motion to Stay His Motion  
4 to Vacate Pending Resolution of Published Ninth Circuit Decision (ECF no. 54) is DENIED  
5 as moot;

6 THE COURT FURTHER **ORDERS** that Quincy Stephens' Motion to Vacate, Set  
7 Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (ECF Nos. 46, 47) is DENIED;

8 THE COURT FURTHER ORDERS that the Clerk of Court shall enter a separate civil  
9 judgment denying defendant Quincy Stephens' 28 U.S.C. § 2255 motion. The Clerk also  
10 shall file this order and the civil judgment in this case and in the related civil case number  
11 2:16-cv-1452-LDG.

12 THE COURT **DECLINES** to issue a Certificate of Appealability.

13  
14 DATED this 18 day of February, 2020.

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16   
17 Lloyd D. George  
18 United States District Judge  
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